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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, Secretary of Defense, et al.,
Petitioners,

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of

whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the requirement of preparation and dissemination of a hypothetical environment impact statement (EIS) regarding the alleged storage of nuclear weapons in the West Loch branch of the Lualualei Naval Magazine on the island of Oahu, Hawaii. The requirement of the Ninth Circuit below that an EIS be prepared is directly contrary to statutory requirements and regulations of the Department of Defense which forbid the dissemination of information regarding whether or not a particular site is being utilized for the storage of nuclear weapons.

Amicus is especially concerned as a public interest organization about the practical effects of dissemination of classified information of this nature. The public dissemination of properly classified military secrets under the pretext of a need for public awareness under the requirements of the National Environmental Policy Act (NEPA) would be disastrous in terms of national security. At a time of heightened awareness of the need for an increase in our overall defense posture, such a requirement would allow those who wish to gain access to classified military secrets concerning the storage of nuclear weapons to circumvent the security measures designed to prevent disclosure of such information by merely requesting a copy of an EIS for any given project. To require a publicly disseminated EIS for every military weapon facility that is *capable* of storing nuclear weapons would in effect make public a "road map" of the nuclear arsenals of the United States. Additionally, it would profoundly affect the manner in which decisions are made regarding the development of future military defense facilities, and would require a significant and unnecessary expenditure of tax dollars in order to divulge military secrets at a time when the national policy favors a decrease in federal spending.

SUMMARY OF ARGUMENT

The requirements of NEPA are clear and must be followed by all federal agencies, including the Department of Defense, unless there is an express statutory conflict. In this case, such a conflict exists in that the Atomic Energy Act forbids the public disclosure of information regarding the military use of nuclear weapons. Neither the exception to full disclosure in an EIS contained in the regulations of the Council on Environmental Quality (CEQ) and the Department of Defense, nor the Ninth Circuit's requirement below of preparation and dissemination of a hypothetical EIS, would satisfactorily avoid the prohibition against publication of classified material contained in the Atomic Energy Act.

The practical effect of the Ninth Circuit's requirement of preparation and dissemination of an EIS here is to construe the Navy's secrecy obligation under the Atomic Energy Act so narrowly as to abolish it. Important decisions with regard to our national security should not be hamstrung by the procedural concerns of NEPA. The NEPA process should not be permitted to be used as a shortcut around the Freedom of Information Act, under which classified information may properly be kept secret in the interest of national security. By requiring classified military secrets to be made public, the Ninth Circuit is serving to undermine our national security at a time when public attention is focused on the need for a strengthening of our national defenses. The decision of the court below requires the unnecessary expenditure of tax dollars in order to make public classified military secrets which should properly be kept confidential.

ARGUMENT

I

THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT MUST BE FOLLOWED UNLESS THERE IS A STATUTORY CONFLICT

The requirements of the National Environmental Policy Act of 1969, 42 U. S. C. §§ 4321, *et. seq.*, are clear and unambiguous. Section 102(2)(C) of NEPA provides, *inter alia*, that all federal agencies *shall* prepare a *detailed* statement concerning the environmental impacts of proposed major federal actions. 42 U.S.C. §4332(2)(C). This Court, citing the Conference Report on NEPA, has recognized that the deliberate command imposed by that statute must "not be shunted aside in the bureaucratic shuffle." *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma*, 426 U.S.776, 787 (1976). Regulations of the Department of Defense provide that NEPA applies to activities of the Department, even if they are of a classified nature. 32 C. F. R. § 214.8(i) (1980).

CEQ, established pursuant to NEPA, has been charged by Executive Order with the duty of preparing regulations to establish guidance for agencies and courts in interpreting and administering NEPA. Executive Order No. 11991 (May 24, 1977). The CEQ regulations appear at 40 C. F. R. §§ 1500-1508 (1980), and require that

> "environmental information [be] available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* at Section 1500.1(b).

The regulations require that an EIS "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives" to the proposed action. *Id.* at Section 1502.1. The EIS shall "rigorously explore and objectively evaluate all reason-

able alternatives, . . . [devoting] substantial treatment to each alternative considered in detail. . . ." *Id.* at Section 1502.14(a) and (b).

However, NEPA provides that agencies are required to comply only "to the fullest extent possible." 42 U. S. C. § 4332. Clearly, NEPA is intended to supplement rather than supplant existing statutory authorizations of federal agencies. *Id.* at Section 4335. The CEQ regulations provide that "[a]gency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements . . . ." 40 C. F. R. § 1507.3(b) (1980). This Court has recognized in *Flint Ridge Development* that "NEPA must give way" when there is "a clear and unavoidable conflict" between the provisions of NEPA and other statutory requirements. 426 U.S. at 788. As in *Flint Ridge Development,* the issue in this case is whether the requirement of preparation of a detailed EIS, subject to public disclosure, conflicts with another statutory duty of a federal agency. In this case, the Court must examine whether the requirements of NEPA conflict with the duties of the Secretary of Defense under the Atomic Energy Act of 1946, as amended, 42 U. S. C. §§ 2011, *et seq.*, and the regulations of the Department of Defense.[1]

II

THE REQUIREMENTS OF THE ATOMIC ENERGY ACT PROHIBIT DISCLOSURE OF INFORMATION REGARDING THE MILITARY USE OF NUCLEAR WEAPONS

The Atomic Energy Act defines all information concerning the design, manufacture, or utilization of nuclear weapons as "restricted data," 42 U. S. C. § 2014(y), the dissemination and

[1] This case does *not* present a rehash of the issue presented in *Concerned About Trident* v. *Rumsfeld,* 555 F. 2d 817 (D. C. Cir. 1977), whether NEPA applies to activities involving national defense. That court's position that there is no case law or statutory support for

(Footnote continued on following page)

declassification of which are to be controlled in order to protect the common defense and security. *Id.* at Section 2161. Restricted data relating primarily to the military utilization of nuclear weapons may not be published unless the Department of Defense and the Department of Energy jointly determine "that such data may be published without constituting an unreasonable risk to the common defense and security." *Id.* at Section 2162(c). Such data may be removed from the category of restricted data provided that it can be adequately safeguarded as defense information, and further provided that it is not made available to any nation or regional defense organization, except under limited circumstances. *Id.* at Section 2162(d). Communication of restricted data to unauthorized persons is punishable by fine or imprisonment. *Id.* at Section 2277; 18 U. S. C. § 793.

Information regarding the military use of nuclear weapons is variously classified as "confidential," "secret," and "top secret" in the Nuclear Weapons Classification Guide prepared by the Department of Defense and the Energy Research and Development Administration. *See* Appendix H to Petition for Writ of Certiorari (hereinafter App.). Similar classifications are given to such data in the Navy Security Classification Guide for Nuclear Weapons. *See* App. I. Further, Navy regulations forbid personnel to reveal any information with regard to the presence or absence of nuclear weapons or components at any particular location. *See* App. J.

A. Full Compliance with the National Environmental Policy Act in This Case Would Be Contrary to the Requirements of the Atomic Energy Act and to the Interests of National Security

The CEQ regulations provide that an EIS which addresses classified proposals may be restricted from public dissemination

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(Footnote continued from preceding page)

a national defense exemption from NEPA rested on the fact that the Navy in that case "pointed to no existing specific statutory authority prohibiting compliance with NEPA . . . or making such compliance impossible." *Id.* at 823.

in accordance with agency regulations dealing with classified information. 40 C. F. R. § 1507.3(c) 1980). The Department of Defense recognizes that it must comply with the requirements of NEPA even with regard to activities of a classified nature, but the Department's regulations also provide that preparation and dissemination of an EIS shall be done "in accordance with the requirements applicable to classified information." 32 C. F. R. § 214.8(i) (1980). Clearly, the preparation and dissemination of an accurate and detailed EIS providing a full and fair discussion of significant environmental impacts and a rigorous exploration and objective evaluation of all available possibilities for the proposed activity would satisfy the requirements of NEPA. However, it would also fly directly in the face of the provisions of the Atomic Energy Act which prohibit the public dissemination of information concerning the military use of nuclear weapons in order to assure that the common defense and security are maintained. An EIS prepared to the detail and extent required by NEPA would of necessity discuss matters that are prohibited from public disclosure by statute and regulation in this case. Under the doctrine of *Flint Ridge Development*, the requirements of NEPA must give way to the needs of national defense and security as provided in the Atomic Energy Act.

B. The Exceptions from Full Compliance Would Not Fulfill the Requirements of the National Environmental Policy Act and Would Conflict with the Atomic Energy Act

The CEQ regulations provide an exception to the strict requirement of NEPA for classified proposed activities which are required by statute to be kept secret in the interest of national defense. 40 C. F. R. § 1507.3(c) (1980). This section permits an EIS to be organized in such a manner that classified information can be contained in one or more annexes, so that these portions can be withheld from public dissemination. Similar language appears in the Department of Defense regulations. 32 C.F.R. §214.8(i) (1980). The Ninth Circuit in this case fashioned yet another alternative to the strict requirements of NEPA by requiring a *hypothetical* EIS to generally assess the

impact of storing nuclear weapons at West Loch, without conceding whether nuclear weapons will in fact be stored there. However, neither of these alternatives would satisfy the requirement of the Atomic Energy Act that data concerning the *possibility* of a particular site as a nuclear weapon storage facility not be divulged. A detailed analysis of the environmental consequences of the storage of nuclear weapons at West Loch could not be revealed to the public under the first alternative above until the material required to be kept secret by the Atomic Energy Act was taken out. So much information would have to be excised from the EIS that the end product would be utterly useless for purposes of agency analysis and comment and public dissemination and review. The second alternative would simply be contrary to the Atomic Energy Act, which prohibits the dissemination of classified information concerning the design, manufacture, or utilization of nuclear weapons at any particular site. The Department of Defense has already complied with NEPA in good faith and to the extent possible without jeopardizing our national security by filing a candidate EIS, generally assessing the environmental effects of the storage of nuclear weapons, without reference to any particular site. *See* App. G. Good faith compliance with NEPA is sufficient in matters involving national defense. *E.g., Smith* v. *Schlesinger,* 371 F. Supp. 559, 561 (C. D. Cal. 1974).

III

THE PRACTICAL EFFECTS OF COMPLYING WITH THE NATIONAL ENVIRONMENTAL POLICY ACT IN THIS CASE DEMONSTRATE THAT AN ENVIRONMENTAL IMPACT STATEMENT SHOULD NOT BE REQUIRED

Despite the fact that it has conceded that the Navy is forbidden by the Atomic Energy Act and the regulations implementing the Act to disclose any information regarding the presence of nuclear weapons at particular sites, the Ninth Circuit has required the Navy to prepare a hypothetical EIS. This serves to construe the Navy's secrecy obligation so narrowly as to effectively abolish it, producing a result that

seriously jeopardizes the public interest in national defense. Issues of national defense necessarily involve questions of confidentiality. "Public disclosure relating to military-defense facilities creates serious problems involving national security." *McQueary* v. *Laird*, 449 F. 2d 608, 612 (10th Cir. 1971). The security of the nation must not be jeopardized by those seeking secret information under the guise of environmental concern. Because a hypothetical EIS dealing with this subject area would unavoidably disclose certain information about the potential nuclear capability of this project, the Ninth Circuit's requirement will force the Department of Defense to make the possibility of disclosure an additional factor in deciding when and how to construct weapon facilities.

The executive branch of the government, which has traditionally been at the forefront in matters of national security, must not be permitted to be thwarted in its efforts by the procedural dictates of NEPA. *See McQueary* v. *Laird*, 449 F. 2d at 612. In an address to an American Bar Association conference, then-Chairman of CEQ, Russell W. Peterson, stated in regard to NEPA that

> "[*e*]*xcept for valid reasons of national security*, every major decision by a Federal agency should be open to the public." Keynote Address by Russell W. Peterson, A.B.A. Natural Resources Section Conference on Environmental Protection and Energy Development at 7 (Nov. 6, 1975) (emphasis added).

In fact, the courts have held that when a conflict arises between NEPA and issues of national security, it is the responsibility of the executive branch of the government to weigh the competing factors; the decision is not within the province of the judiciary. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 795 (D. C. Cir.), *aff'd*, 404 U. S. 917 (1971).

If the information at issue here were sought under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, rather than under NEPA, nondisclosure would be justified under either Section 552(b)(1), which exempts from disclosure matters required to be kept secret in the interest of national security,

or under Section 552(b)(3), which permits nondisclosure of matters specifically exempted from disclosure by statute. *See Hayden* v. *National Security Agency/Central Security Service*, 608 F. 2d 1381 (D. C. Cir. 1979), *cert. denied*, 446 U. S. 937 (1980). "In national security cases, some sacrifice to the ideals of the full adversary process are inevitable." *Military Audit Project* v. *Casey*, slip op. at 53, No. 80-1110 (D. C. Cir. May 4, 1981) (FOIA case). The Ninth Circuit below permits the respondents here to do under NEPA what they would be prohibited from doing under FOIA. To affirm that decision would provide a convenient vehicle for circumventing the clear intent of Congress under the very statute designed to control the disclosure or nondisclosure of information to the public, by merely asserting a concern for the environment, be it real or fancied. The NEPA process should not be permitted to be used to short-circuit the FOIA process.

To require the preparation and dissemination of an EIS in this instance would open up a veritable Pandora's Box. It would be folly for the federal government to assure the integrity of our national defense systems by providing an intricate and detailed scheme for the protection of information regarding the nature, presence, capacity, and capability of nuclear weapons and nuclear weapon storage sites, with fine or imprisonment as punishment for unauthorized dissemination of such information, and then to turn around and allow anyone, friend or foe alike, for the cost of a telephone call or a postcard, to have access to such information through his or her own personal copy of an EIS whenever the federal government proposes to undertake an activity involving or potentially involving the military use of nuclear weapons.

The requirement of a hypothetical EIS regarding the storage of nuclear weapons for each and every facility in the country which is *capable* of storing such weapons would serve to pinpoint the precise locations of our nuclear arsenals and would place invaluable defense information concerning possible nuclear weapon storage sites at the disposal of our allies as well as our enemies. The availability of this information to our

adversaries would unquestionably affect the balance of power in favor of those opposed to the free world, at a time when our national policy calls for an *emphasis* on national defense. The national policy favoring an increase in our defense posture comes as a result of the awareness that we have fallen behind our adversaries in terms of our military defense capability. Congressional Research Service, *United States/Soviet Military Balance* (1976). *See, e.g.*, F. Hoeber, W. Schneider, N. Polmar, and R. Bessette, *Arms, Men and Military Budgets* (1980).

The detrimental effect to our national security by requiring disclosure of the information at issue will be compounded by the adverse effect on the national treasury by the required expenditure of funds to comply with the NEPA process. Preparation of a draft and final EIS for a major project including all the required consultation, evaluation, and agency and public comment, is an exhaustive process. *See* W. Rodgers, *Handbook on Environmental Law* § 7.4 at 725-38 (1977). Typically, the entire process can cost hundreds of thousands of dollars. Council on Environmental Quality, *Environmental Quality—1980* 372 (1980) (average EIS cost for 50 wastewater treatment plants was $158,585). In some instances, EIS costs for a particular project can involve multiple studies and run into the millions of dollars. For example, the Trident Submarine Program involved the preparation of at least 27 separate environmental assessments, draft EIS's, candidate EIS's, and final EIS's, which represents a significant drain on the federal treasury. *Concerned About Trident* v. *Schlesinger,* 400 F. Supp. 454, 473 (D. D. C. 1975), *aff'd in part, rev'd in part,* 555 F. 2d 817 (D. C. Cir. 1977). This Court should not allow the expenditure of hard-earned tax dollars in order to divulge classified military secrets to the public.

CONCLUSION

The need for full and fair discussion of the environmental consequences of major federal actions is not a requirement that should be dismissed lightly. However, in *this* case, the requirement of public disclosure under NEPA directly conflicts with the requirement of secrecy contained in the Atomic Energy Act. For all of the above reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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